Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No. 92-784

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

Petition For Writ Of Certiorari To The Oklahoma Supreme Court

AMICUS CURIAE BRIEF OF FREE SPEECH ADVOCATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENTS IN FAVOR OF ALLOWING THE WRIT 4

I. INITIATIVE PETITIONS AND FREE SPEECH 4

II. JUDICIAL INTERFERENCE 7

III. EXACTING SCRUTINY 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

American Fed. of Labor - Congress v Eu, 686 P.2d 609 (Cal. 1984) 8

Caine v Robbins, 131 P.2d 516 (Nev. 1942) 8

Hessey v Burden, Nos. 92-CIV-126, 92-CIV-172, 1992 WL 312830 (D.C. App. Oct. 27, 1992) 9

Lips v Meier, 336 N.W.2d 346 (N.D. 1983) 8

Meyer v Grant, 486 U.S. 414 (1988) . 7

State v Murray, 394 P.2d 761 (Mont. 1964) 8

Stumpf v Lau, No. 23517, 1992 WL 235458 (Nev. Sept. 18, 1992) 8

West Palm Beach Ass'n v Board of City Comm'rs, 448 So. 2d 1212 (Fla. App. 1984) 8

White v Welling, 57 P.2d 703 (Utah 1936) 8

In re Initiative Petition 349, State Question 642, 63 Okla. B.J. 2386 (August 4, 1992) (No. 76,437) . . 12,13

In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, 534 P.2d 3 (Okla. 1975) . . 8

Other Sources

Tentative Report of the TIPS Task Force on Initiatives and Referenda, (Tort and Insurance Practice Section of the American Bar Association), (submitted August 11, 1992) 5,6

INTEREST OF THE AMICUS CURIAE

Free Speech Advocates ("FSA") is a nonprofit legal defense project dedicated to securing the First Amendment rights of individuals and organizations opposing the deliberate destruction of innocent human life. Opponents of speech on controversial issues all too frequently employ judicial or other legal mechanisms in an attempt to silence the controversial speech. Judicial restraint of political speech—either by exclusion of voter initiatives or by censorship of candidate campaigns—is especially noxious because it strikes at the core of the process of representative democracy. FSA submits this amicus brief to urge the Court to review—and overturn—the Oklahoma Supreme Court's throttling of the initiative process in the State of Oklahoma.

SUMMARY OF THE ARGUMENT

The initiative petition process provides a peculiar forum for political expression. From circulation through voting, such process involves the free expression of a democratic people in its purest form. Such process should therefore be jealously safeguarded from judicial interference.

Nonetheless, several jurisdictions, including Oklahoma, have applied their own laws to permit the judiciary to prevent measures proposed by thousands of registered voters from being submitted to a vote of the people based solely upon the content of the proposal. Such rule is based upon an underestimation of the protection afforded core political speech by the United States Constitution and of the inherent value of public debate concerning controversial measures of intense public concern, regardless of

their ultimate enforceability. Even measures which conflict with longstanding constitutional principles should be given access to the marketplace of ideas without judicial interference.

ARGUMENTS IN FAVOR OF ALLOWING THE WRIT

I. INITIATIVE PETITIONS AND FREE SPEECH

Nearly half of the fifty states grant their citizens the right to propose and enact legislation independent of the state legislature. This process serves as a valuable supplement to representative democracy. Elected representatives may be unresponsive to the popular will due to a desire to avoid controversy, for fear of offending influential special interests or simply because the will of the people conflicts with their personal interests.

Because of growing discontent with legislative excess or inaction, the use of initiative petitions has proliferated in recent years. From 1986 to 1990, over 250 citizen initiated petitions were submitted

to a popular vote.[1/] Such figure does not include petitions which were circulated, but never placed on the ballot, either because they were withdrawn, lacked a sufficient number of signatures or were stricken from the ballot by the courts.

By their very nature, initiative petitions often relate to controversial issues of intense interest to the citizenry implicating complex constitutional issues. For example, in this most recent election, voters in various states adopted or rejected initiatives regarding term limits for elected officials, the rights of homosexuals, balanced budget requirements and taxpayer protection.

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[1] *Tentative Report of the TIPS Task Force on Initiatives and Referenda*, (Tort and Insurance Practice Section of the American Bar Association) (submitted August 11, 1992), p. 7.

The entire initiative petition process, including circulation of the petition, campaigning for or against the proposition and the voting itself, constitutes a unique forum for political expression. As noted in the Tentative Report of the TIPS Task Force on Initiatives and Referenda (Tort and Insurance Practice Section of the American Bar Association) submitted August 11, 1992, at 4:

> [Initiative petitions] have an importance to the overall political process and democratic governance that transcends their effect on particular laws. Individuals tend to become engaged in campaigns on ballot propositions in ways that are not found in electoral campaigns for individual officials. The issues that are the subject of the campaign may hold an especially intense interest for certain individuals and entice them into political action. Thus, wholly apart from the benefit they confer as a check on legislative excess or inaction, initiatives and referenda possess the potential to foster a level of

participation that is highly desirable in a democratic state.

Inherent in this process are the most cherished principles of free expression in a democratic state. It is difficult to imagine a more pristine example of political expression deserving of more zealous protection. This Court has therefore held that such process involves "core political speech" and any limitation thereon is subject to "exacting scrutiny."[2/]

II. JUDICIAL INTERFERENCE

Twenty-four jurisdictions authorize initiative petitions. At the time of the decision below by the Oklahoma Supreme Court, seven jurisdictions, including Oklahoma, censored initiatives based upon

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[2] *Meyer v Grant*, 486 U.S. 414 (1988).

their content.[3] Subsequently, the Supreme Court of Nevada, relying in part on the Oklahoma Supreme Court's decision below, reaffirmed its rule permitting presubmission judicial screening of initiatives and struck from the ballot a "term limits" initiative as "palpably unconstitutional."[4] Shortly thereafter, the District of Columbia Court of Appeals, which had previously been silent on the issue, joined the seven jurisdictions holding that pre-election review of constitutional challenges to proposed

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[3] *American Fed. of Labor - Congress v Eu*, 686 P.2d 609 (Cal. 1984); *West Palm Beach Ass'n v Board of City Comm'rs*, 448 So. 2d 1212 (Fla. App. 1984); *Caine v Robbins*, 131 P.2d 516 (Nev. 1942); *Lips v Meier*, 336 N.W.2d 346 (N.D. 1983); *State v Murray*, 394 P.2d 761 (Mont. 1964); *White v Welling*, 57 P.2d 703 (Utah 1936); *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3 (Okla. 1975).

[4] *Stumpf v Lau*, No. 23517, 1992 WL 235458 (Nev. Sept. 18, 1992).

initiatives was permitted.[5/] Thus, the trend of recent cases has been in favor of permitting judicial encroachment upon the initiative process before the voters have a chance to express themselves on the proposed measure.

Any enactment, whether initiated by citizens or their elected representatives, must ultimately withstand legal challenges to its enforceability, whether constitutional or otherwise. The issue is not whether the proposed initiative in this case or any other would be constitutional if adopted. No challenge is posed to the ultimate authority of the United States Constitution as construed by this Court. The sole issue is whether the First and Fourteenth Amendments prohibit judicial interference with the right of the

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[5] *Hessey v Burden*, Nos. 92-CIV-126, 92-CIV-172, 1992 WL 312830 (D.C. App. Oct. 27, 1992).

citizens to express themselves regarding an initiative proposed by thousands of their fellow citizens.

III. EXACTING SCRUTINY

A review of the majority opinion in the case below offers little comfort that its content-based prior restraint of core political speech can be upheld under the applicable exacting scrutiny standard. The Oklahoma Supreme Court attempted to justify its silencing of public debate by characterizing a vote of the people as "useless."[6]

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[6]Interestingly, the same concern over useless acts could be equally applied to the ordinary legislative process. A considerable amount of time effort and state resources are invested in the enactment of a bill into law. After a bill is introduced, it is studied, hearings are held, representatives are lobbied by interested parties, constituents are consulted and the measure is debated before it is finally approved. If conservation of resources is the preeminent goal, a bill introduced in the legislature should be immediately submitted to the highest court of the state for review of its validity before any more time and resources are wasted on a "useless" process.

It is submitted that core political speech does not have to be demonstrably useful in order to be accorded First Amendment protection. Instead, it is intrinsically valued without regard to its content. However, the usefulness of a campaign and vote on a measure proposed by thousands of citizens is easily defended, even if it is assumed for the sake of example that the measure, if approved, would be ultimately found by this Court to be unconstitutional. The campaign and vote stimulate focused statewide debate aimed at building a popular consensus on the specific issue. Even if the measure as written is unenforceable, the campaign and vote on such measure are powerful tools for either promoting or resisting political change. Elected state representatives can be motivated to enact or oppose less restrictive legislation.

Impetus towards amending the Constitution to remove constitutional impediments may be enhanced or diminished. Speech advocating changing the United States Constitution and its construction is itself jealously protected from judicial censorship by the First Amendment.

The hypothetical posed by the majority opinion is a useful illustration. Justice Kauger stated:

> Judicial intervention to interdict a hypothetical state constitutional amendment prohibiting the free exercise of religion would 'limit' proponents 'core speech' activities; however, no one would question the legitimacy of such a limitation.

In re Initiative Petition 349, State Question 642, 63 Okla. B.J. 2386, 2391 (August 4, 1992) (No. 76,437).

On the contrary, even measures which challenge longstanding traditional constitutional principles should be debated and voted upon if they are

proposed by a significant segment of the state's voters, regardless of the validity of the proposed enactment. The ultimate unenforceability of the petition is an inadequate basis for silencing the debate over its merits. If a sufficient number of voters were to propose abolition of the right to free exercise of religion, public expression on the issue should be encouraged, not silenced. In the course of such discussion, statewide attention would be focused upon the reasons for and against protecting individuals in the free and unfettered exercise of their religious beliefs. Such a debate and vote can only be considered healthy exercises for a democratic people, rather than "ultimately meaningless acts in an elaborate charade." 63 Okla. B.J. at 2392.

CONCLUSION

The protection afforded the right of the people to express themselves by proposing or opposing legislation should be coextensive with their right to express themselves similarly in any other arena. The issue is whether citizens of this nation have the right to publicly endorse any legislation without regard to its constitutionality. It is therefore submitted that judicial intervention to strike initiative petitions from the ballot on the basis of anticipated constitutional invalidity is itself a constitutionally impermissible content-based prior restraint of core political speech.

Respectfully submitted,

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